Dec 10, 2000

No. 00-949

IN THE

Supreme Court of the United States

GEORGE W. BUSH and RICHARD CHENEY,

Petitioners,

v.

ALBERT GORE, JR., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF *AMICUS CURIAE* OF THE BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW IN SUPPORT OF RESPONDENTS

BURT NEUBORNE
Counsel of Record
NATHANIEL PERSILY
PHILIP G. GALLAGHER
BRENNAN CENTER FOR JUSTICE
AT N.Y.U. SCHOOL OF LAW
Attorneys for Amicus Curiae
161 Avenue of the Americas
12th Floor
New York, New York 10013
(212) 998-6730

164032

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED

1. May the term "Legislature" as used in Article II, section 1 of the United States Constitution be construed to grant the members of a state legislature the power to provide for the selection of Presidential electors without regard to the judicially enforceable constraints and norms imposed by a state's constitution?

2. Can the good faith effort of the Supreme Court of Florida to construe and implement ambiguous and incomplete provisions of the Florida election laws in order to assure that the votes of all voters be counted in accordance with the mandate of the Florida Legislature and the Florida Constitution be deemed an improper post-election revision of the rules governing the selection of Presidential electors within the meaning of 3 U.S.C. § 5? If so, does 3 U.S.C. § 5 violate the Tenth Amendment to the United States Constitution?

3. Does the effort of the Florida Legislature and the Florida Supreme Court to discern the intent of voters in connection with so-called "undercounted" votes for President violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by introducing varying standards into the vote counting process?

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INTEREST OF *AMICUS CURIAE*

The Brennan Center for Justice at N.Y.U. School of Law is a non-partisan organization that seeks to honor the memory of Justice William J. Brennan, Jr. by seeking to protect and defend the institutions of American democracy.[1] In the context of the 2000 election, the Brennan Center has represented Republicans, most notably Senator John McCain in his successful challenge to the provisions of the New York State Election Law that denied him a place on the New York State Republican Presidential Primary ballot; Democrats, most notably members of the Missouri legislature in this Court in defense of efforts to limit the size of campaign contributions; and minor party candidates, most notably Ralph Nader in his efforts to obtain ballot status in Illinois, Idaho, and North Carolina.

This case raises critical issues concerning the integrity of the democratic process in Florida, and the role of courts in enforcing the guarantees of the equal right to vote, and the equal right to have one's vote counted that are contained in the Constitution of the State of Florida, as well as the Constitution of the United States. This brief *amicus curiae* is submitted in the hope that the Court will find it helpful in analyzing the issues before it.

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1. As required by Rule 37(6) of the Rules of the Supreme Court of the United States, *amicus* Brennan Center states that the accompanying brief was not authored in whole or in part by counsel for any of the parties. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amicus curiae* and its counsel.

STATEMENT OF THE CASE

In an effort to determine the winner of the closest Presidential election in history, the State of Florida has expended substantial resources in seeking to identify the Presidential candidate who received the plurality of the votes in the State of Florida. The two leading candidates — Vice President Gore and Governor Bush — are in a virtual tie, creating an unaccustomed need to account accurately for every ballot.

Pursuant to Florida law, the initial effort to determine the will of the electorate was carried out by a machine count of ballots pursuant to the two machine voting systems used in the state — optical scanning and punch card voting. Optical scanning machines "read" marks on the ballot, and are generally conceded to have a very low rate of failure in tabulating a voter's expressed will. Punch card voting depends upon an older technology that allows machines to search for holes in the ballot made by voters next to the name of the preferred candidate. Few could dispute that punch card technology leaves room for considerable inaccuracy in tabulating a vote, either because the hole is not large enough, because the voter's punch has not completely removed all debris, or because the ballots may be misaligned with the punch mechanism. *See Siegel v. Lepore*, No. 00-15981, 2000 WL 1781946, slip op. at 124, 127 (chart C & F) (11th Cir. 2000).

The result of the first machine count was so close that, under Florida law, a second machine count was automatically required. *See* Fla. Stat. 102.141(4) (2000). The results of the second machine count were also extraordinarily close, and triggered a high level of concern over the reliability of the

punch card machines in accurately reflecting the will of the voters. It quickly became clear that many thousands of Florida voters in punch card counties had fallen prey to confusion in seeking to vote for President, resulting in the disqualification of approximately 50,000 votes in areas where Vice President Gore appeared to command large majorities. The Florida courts, while acknowledging the unfortunate nature of such a confusion-induced failure of punch card technology, recognized that nothing could be done to restore the lost votes. *See Fladell v. Palm Beach Canvassing Bd.*, No. SC00-2373, 2000 WL 1763142 (Fla. 2000). Instead, attention centered on the substantial number of Presidential ballots in punch card counties for which no vote was registered, either because the voter elected to abstain from voting for President, or because the punch card machine failed to tabulate the vote accurately.

Using the so-called "protest" provisions of Florida election law, Vice President Gore challenged the result of the machine counts, arguing that a hand recount was necessary to determine whether the punch card machines had failed to tabulate a significant number of Gore votes. *See Bush v. Palm Beach Canvassing Bd.*, 121 S. Ct. 471 (2000). Pursuant to Florida law, Vice President Gore sought hand recounts in punch card counties with a high percentage of "blank" votes for President — Dade, Palm Beach, Broward, and Volusia. *See Gore v. Harris*, No. SC00-2431, slip op. at 28 n.16 (Fla. Dec. 8, 2000). Governor Bush, although eligible to seek hand recounts in other counties, elected not to do so.

When it became clear that hand recounts could not be completed within the time limits established by Florida law for certifying the election results, the parties turned to the

Supreme Court of Florida to clarify the apparent conflict between the time limits established by the Florida legislature for election certification, and the legislative grant of a right to seek a hand recount in settings where serious doubt exists about the accuracy of the machine tabulation. Using classic techniques of statutory construction, the Florida Supreme Court found that the conflict between the two statutory provisions should be resolved in favor of permitting a speedy completion of the hand recounts, unless the hand recounts posed a risk to the timely certification of Presidential electors. *See Palm Beach County Canvassing Bd. v. Harris*, Nos. SC00-2346, SCC00-2348, SC00-2349, 2000 WL 1725434 (Fla. Nov. 21, 2000), *vacated and remanded, sub nom. Bush v. Palm Beach County Canvassing Bd.*, 121 S. Ct. 471 (2000). In reaching its decision, the Florida Court relied upon the intense concern for the franchise embodied in the Florida Constitution as a guide to determining the will of the legislature. *See, e.g.*, 2000 WL 1725434, at *6, *12, *15.

Governor Bush appealed to this Court, arguing that the action of the Florida Supreme Court in delaying certification of the election results in order to permit completion of hand recounts: (1) violated Article II, section 1 of the United States Constitution because the Florida Supreme Court allegedly unduly "circumscribed" the power of the "legislature" to direct the appointment of Presidential electors; and (2) violated 3 U.S.C. § 5 because it constituted a post-election change in the rules governing the selection of Presidential electors. *See* Brief for Petitioner Bush at i, *Bush v. Palm Beach County Canvassing Bd.*, No. 00-836 (U.S.). This Court, unable to discern from the text of the decision of the Supreme Court of Florida whether the Florida decision was intended to "circumscribe" the power of the Florida legislature by imposing state constitutional constraints on the process of choosing

electors, or was intended merely to carry out the will of the Florida legislature by using the Florida Constitution as a guide to statutory construction, vacated the Florida decision and remanded for further proceedings. *See Bush v. Palm Beach County Canvassing Bd., supra.*

In the meantime, the Florida Secretary of State had certified Governor Bush as the winner, provisionally accepting the results of complete hand recounts in Broward and Volusia Counties which had been completed prior to the deadline set by the Florida Supreme Court, rejecting a complete hand recount in Palm Beach County that was completed two hours after the court deadline, and never receiving a partial hand recount in Dade County that had been carried out prior to a decision by local officials to suspend the hand recount. Invoking an entirely different set of Florida statutory provisions providing for judicial review of contested elections, Vice President Gore "protested" the certification of Governor Bush as the winner of the Florida Presidential election, arguing that it violated Florida law to ignore the results of the hand recounts in Broward, Palm Beach, and Dade Counties, and that election officials in Dade County had violated Florida law in suspending the hand recount in the face of turbulent protests. *See Gore v. Harris*, No. SC00-2431, slip op. at 2-3 (Fla. Dec. 8, 2000).

The Supreme Court of Florida ruled that Florida statutes authorized the immediate hand recount of all "undercounted" Presidential ballots throughout the state in order to assure that the election actually reflects the will of the voters and not the vagaries of flawed technology. *See id.*, slip op. at 39-40. This appeal followed, in which Petitioner argues that the Florida Supreme Court has violated Article II, section 1 by using the Florida Constitution to

"circumscribe" the untrammeled power of the Florida legislature to control the selection of Presidential electors. *See* Emergency Application of Bush at 23-28, *Bush v. Gore*, No. 00949 (U.S.). Petitioner argues, as well, that providing for a judicially-mandated hand recount alters the rules governing the selection of electors in violation of 3 U.S.C. § 5, and that conducting such a hand recount pursuant to varying standards of how to determine the intent of the voter introduces an unconstitutional degree of non-uniformity into the process. *See id.* at 29-34.

In response to Governor Bush's appeal, this Court voted 5-4 to stay the hand recounts pending oral argument on Monday, December 11, 2000.[2] *See Bush v. Gore*, No. 00-949 (U.S. Dec. 9, 2000).

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2. The grant of the stay, which renders it virtually impossible to complete the hand recounts by December 12, and, therefore, virtually impossible to know whether the machine tabulations were accurate in time to correct the errors, appears to stand the principle of irreparable injury on its head. Allowing the recounts to go forward could not have caused irreparable injury, since the Court would be free to reject the results. However, barring the hand recounts pending argument makes it virtually impossible to complete them, even if the Court finds the hand recounts to have been lawful. Justice Scalia's suggestion that stopping the hand recounts was needed to shield the nation from knowledge of what a hand recount would reveal is an uncharacteristic exercise in judicial paternalism. It is, moreover, futile, since the ballots will undoubtedly be counted by news organizations and academics — too late to affect the outcome of the election, but in time to call the legitimacy of the Presidency into question.

ARGUMENT

I.

THE TERM "LEGISLATURE" AS USED IN ARTICLE II, SECTION 1 OF THE UNITED STATES CONSTITUTION CANNOT BE READ TO EMPOWER THE MEMBERS OF A STATE LEGISLATURE TO IGNORE THE CONSTRAINTS AND NORMS IMPOSED UPON THE LEGISLATURE BY THE STATE CONSTITUTION.

In its *per curiam* decision vacating the decision of the Florida Supreme Court, it appeared that certain members of this Court were reading the term "Legislature" as it is used in Article II, section 1 as providing an unrestricted grant of power to the members of a state legislature to ignore constraints and norms imposed on a state legislature by the state's constitution. Indeed, the only principled basis for the grant of a stay preventing the State of Florida from completing the hand recounts ordered by the Florida Supreme Court would be a belief that the Supreme Court of Florida was in violation of Article II, section 1 when it sought to invoke the provisions of the Florida Constitution to resolve ambiguities in the Florida statutory scheme, and to fill lacunae in the remedial scheme.

To the extent that the Court's reasoning is based upon such a deracinated reading of the term "Legislature," *amicus* earnestly urges the Court to reconsider a reading of Article II, section 1 that is inconsistent with the rule of law, and that cannot be viewed as a principled application of its recent jurisprudence. Reasonable people may disagree with the decision of the Florida Supreme Court about the meaning

of Florida law. Moreover, it is impossible to ignore the importance of the ruling in determining the next President. But neither the stakes involved, nor the closeness of the legal issues of state law justify the use of Article II, section 1 to "federalize" the Florida Legislature in an effort to freeze the Florida Supreme Court out of the process of construing Florida law.

A. The Term "Legislature" When Used In Article II, Section 1 Of The Constitution Must Mean A Political Institution Functioning In Accordance With The Judicially Enforceable State Constitutional Powers And Constraints That Give It Life.

There is a suggestion by certain members of this Court in both the opinion granting the stay and the *per curiam* opinion vacating the first decision of the Supreme Court of Florida that a state "legislature" empowered by Article II, section 1 to "appoint" electors is licensed to act inconsistently with the state's constitution, and that any effort by the State's highest tribunal to use the State's constitution as a guide to construing legislative will concerning the method of selecting electors, or as a means of filling legislative gaps concerning remedies, is a violation of the Federal Constitution. To begin with, the Constitution does not require states even to create legislatures. But, in any event, a political entity authorized to act inconsistently with the very state constitution that created it is simply not the state legislature. Rather it is a group of individuals purporting to exercise legislative power, but refusing to adhere to the basic norms that govern legislative conduct in the relevant state.

In his 1964 Holmes Lecture, Henry Hart began by asking the audience what a "single" would be like if there were no

baseball. *See* Burt Neuborne, *Tales of Popular Sovereignty Making the Law Safe for Democracy: A Review of 'the Law of Democracy Etc.'*, 97 Mich. L. Rev. 1578 (1999) (describing Hart's 1964 Holmes lecture). Professor Hart was seeking to remind us that a legal institution may not be torn from its context and treated as a freestanding phenomenon unencumbered by the constraints imposed by the structural matrix in which it exists. Professor Hart's question resonates through this appeal. Paraphrasing Professor Hart, can an American state legislature be torn from the constitutional matrix that both created the legislature and constrains its powers? State legislatures, like baseball singles, cannot be ripped from their institutional matrix and treated like freestanding phenomena. The very idea of an American "legislature" carries with it the constitutional constraints and norms that establish the legislature, define its powers, and limit the scope of its lawful operations.

Since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), it has been the hallmark of the American experiment in democracy and the rule of law to recognize that legislatures swim in a sea of constitutional norms that both empower and restrict legislative action. Indeed, in recent years, a narrow majority of this Court has repeatedly rebuffed efforts by Congress to expand its operations beyond the limits of the narrow majority's reading of Congress's proper constitutional powers. *See, e.g., United States v. Morrison*, 120 S. Ct. 1740 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995). It is inconceivable that the Founders, having literally invented the idea of a legislature constrained by judicially enforceable constitutional norms, would have used Article II, Section 1 as a vehicle to create a state legislative body empowered to disregard the very state constitution that established it.

Nothing in *McPherson v. Blacker*, 146 U.S. 1 (1892), suggests otherwise. In rejecting a challenge to a state legislative decision to elect electors by congressional districts instead of at-large, Chief Justice Fuller stressed that the judgment about the means of choosing Presidential electors was delegated by Article II, section 1 to the legislatures of the several states, and that no particular means of selection was mandated by the Federal Constitution. But the *McPherson* Court never suggested that the state legislature was free to ignore the state constitution in exercising its Article II responsibilities. Indeed, Chief Justice Fuller was careful to point out that state legislative action under Article II, section 1 must be subject to state constitutional limits. In describing the nature of the state legislature that was to exercise Article II power, Chief Justice Fuller noted:

> The state does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative power is the supreme authority, *except as limited by the constitution of the state*, and the sovereignty of the people is exercised through their representatives in the legislature, *unless by the fundamental law power is elsewhere reposed.*

146 U.S. at 24-25 (emphasis added).

B. Even If The Original Text Of Article II, Section 1 Could Be Read As Authorizing State Legislative Action In Violation Of A State's Constitution, Such A Reading Cannot Survive The Adoption Of The Tenth Amendment.

As *amicus* has argued, it is inconceivable that the Founders intended to free state legislatures from state constitutional constraints in carrying out the responsibilities vested in them by Article II, section 1. Even if the original text of Article II could be read as immunizing state "legislatures" from state constitutional constraints when they regulate the selection of Presidential electors, such a reading cannot survive the adoption of the Bill of Rights, with its explicit protection of state sovereignty in the Tenth Amendment. It is not so much that the Tenth Amendment would overrule Article II, Section 1, but the principles of state sovereignty embodied in the Tenth Amendment inform us as to how Article II, section 1 should be construed.

As a narrow majority of this Court has held in recent years, the Tenth Amendment forbids the federal government from "commandeering" an agency of the state government to perform a federal function in ways that interfere with the sovereign prerogatives of the state. *See Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992). It would be a strange Tenth Amendment that forbade Congress from "commandeering" state sheriffs to conduct background checks on hand gun purchasers, but permitted a state's legislature to be severed from its state constitutional moorings in carrying out Article II, section 1 responsibilities.

It is, of course, true that cases like *Printz* and *New York v. United States* involve efforts by Congress to impose duties on state agencies under general grants of constitutional authority, while this case involves the language of the Constitution itself. But this Court has repeatedly recognized that language in an earlier provision of the Constitution must be read in light of subsequent provisions that may alter or even overrule the meaning of prior provisions. For example, a narrow majority of this Court has held that the plenary grant of power to Congress under the original Commerce Clause was limited by the enactment of the Eleventh Amendment, even in the absence of a literal collision between the two provisions of the Constitution. *See Seminole Tribe v. Florida*, 517 U.S. 44 (1996). The Court has also held that the limits imposed by the Eleventh Amendment may be overridden by Congress when it acts pursuant to the later-enacted Fourteenth Amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). Most dramatically, in *Richardson v. Ramirez*, 418 U.S. 24 (1974), this Court construed the provisions of section 2 of the Fourteenth Amendment to limit the reach of section 1 of the Fourteenth Amendment in order to uphold a state's disenfranchisement of ex-felons. Just as the Eleventh Amendment altered the Commerce Clause, the Fourteenth Amendment altered the Eleventh, and section 2 of the Fourteenth Amendment altered section 1, so the adoption of the Tenth Amendment ended any possibility of reading Article II, section 1 as authorizing state legislatures to act in violation of state constitutions when they carry out their Article II, section 1 responsibilities.

Thus, when the Florida Supreme Court referred to the Florida Constitution in construing ambiguities in the Florida statutory scheme and in filling remedial gaps in that scheme, the Court was not acting in violation of Article II, section 1

of the United States Constitution. By using the Florida Constitution to help resolve state statutory ambiguities and to fill state remedial lacunae, the Florida Supreme Court was acting precisely as the Founders hoped, and well within the sovereign prerogative of the State of Florida.[3]

II.

IF 3 U.S.C. § 5 IS READ TO PREVENT THE SUPREME COURT OF FLORIDA FROM CONSTRUING FLORIDA STATUTORY LAW TO PERMIT A HAND RECOUNT OF PRESIDENTIAL BALLOTS TO ASSURE THAT ALL VOTES ARE COUNTED, IT WOULD VIOLATE THE TENTH AMENDMENT.

Petitioner argues that Florida's Supreme Court violated 3 U.S.C. § 5 by engaging in a post-election alteration of the rules governing the selection of Presidential electors. Unlike the Bush challenge to the Florida Supreme Court's initial ruling extending the certification deadline to enable the completion of hand recounts, there is no suggestion that the Florida Court has ignored a Florida legislative mandate. Rather, the argument is that the decision to order hand recounts of all undercounted Presidential ballots throughout the state in accordance with Florida statutes permitting such recounts under certain circumstances is an exercise in judicial remediation that goes beyond the legislature's established procedures.

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3. An extreme reading of Article II, section 1 ultimately calls into question the entire federal statutory scheme regulating the choice of electors. If only the state legislature may direct the manner of appointing electors, then from where does Congress get the power to limit that authority with specific procedures referring to the state judiciary and executive as in 3 U.S.C. § 5 and 3 U.S.C. § 15?

To the extent that this appeal is based on an argument that the Florida Supreme Court has made a mistake concerning the meaning of Florida law, it has no place in this Court. The last word on the meaning of Florida law must be spoken by the Supreme Court of Florida, even in cases involving the selection of Presidential electors. To the extent that Petitioner is arguing that the Florida Supreme Court violated federal law by altering the rules governing the selection of Presidential electors after the election, the objection is subject to three responses. First, the Florida Supreme Court was scrupulous in basing its ruling on existing Florida statutory law. When, as here, a court construes a statute, it cannot be deemed to be making new law. Rather, the court is applying pre-existing law. Otherwise, courts could never be asked to play a role in resolving election contests involving Presidential electors, since the loser will always claim that the adverse ruling fails to carry out the will of the legislature, and, thus, unfairly changes the rules. Thus, arguing that the Florida Court got its own law wrong is simply not a basis for invoking 3 U.S.C. § 5. Second, it is highly doubtful that 3 U.S.C. § 5 is intended to be judicially enforceable. Rather, it is merely a "safe harbor" rule governing Congressional challenges to Presidential electors. Finally, 3 U.S.C. § 5 cannot be read to permit this Court to sit in superintendence over the Florida Court's construction of Florida law without violating the Tenth Amendment.

Petitioner argues that 3 U.S.C. § 5 turns this Court into the Supreme Court of Florida in any case involving the selection of Presidential electors. If the Florida Supreme Court utilizes a theory of statutory construction, or an approach to remedies that a narrow majority of this Court believes is wrong, Petitioners' reading of the federal statute authorizes this Court to substitute its views about how to

read Florida statutes for the views of the Florida Supreme Court. Similarly, under Petitioners' reading of the federal statute, if this Court does not believe that judicially ordered remedies are warranted under its reading of Florida law, this Court may simply displace the reading of the Supreme Court of Florida. At bottom, Petitioners' position is that, in cases affecting the selection of Presidential electors, the Supreme Court of Florida is free to interpret Florida law, as long as a majority of this Court agrees with the outcome. Such a construction of 3 U.S.C. § 5 cannot pass muster under the Tenth Amendment.

Congress lacks power to place a state Supreme Court under the tutelage of this Court in connection with the decision of state law claims, first, because Congress must respect the essential sovereignty of state decisional processes, *see New York v. United States*, *supra*, and, second, because Congress may not commandeer a state court system to help it choose Presidential electors. *See Printz v. United States, supra*. If Congress lacks power under the Tenth Amendment to impose age restrictions on a state judiciary, *see Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991), surely it lacks the power to impose the views of a majority of the Supreme Court on a state Supreme Court seeking to construe its own state laws.

III.

THE RECOUNT PROCESS SANCTIONED BY FLORIDA STATUTE AND EXECUTED BY THE FLORIDA SUPREME COURT PREVENTS A VIOLATION OF THE EQUAL PROTECTION CLAUSE BY REMEDYING THE DISPARITIES THAT RESULT FROM AN ELECTORAL SCHEME THAT PRODUCES WIDESPREAD INTERCOUNTY VARIATION IN THE MECHANICS OF VOTING.

Petitioners' Equal Protection claim emphasizes disparities created by a counting regime that grants discretion to local officials to discern the "intent of the voter" from the range of potential ways of expressing such votes with markings on ballots. If different observers could look at similar ballots and arrive at different conclusions as to voter intent, they argue, the counting regime must fall prey to the Fourteenth Amendment. In order to make such an argument, Petitioners ignore completely the Equal Protection violation that would occur if differently situated counties were treated the same and the need for county-based discretion in discerning voter intent to address Florida's patchwork quilt of an electoral system. Were it to become law, Petitioners' argument would also call into question the election results themselves in Florida and any other states that decentralize authority to conduct elections.

First, the intercounty variation in voting mechanics requires that different standards for "intent of the voter" be used in order to *avoid* a violation of the Equal Protection Clause. By operating a decentralized electoral system, the Florida Legislature and the Florida Supreme Court that implemented its statutory scheme could not then mandate a

one-size-fits-all method of recounting that treated optical scanned ballots the same as punch-card ballots or treated counties using different types of punch-card voting mechanisms, such as the Votomatic and Pollstar machines, as if they were the same. To do so would guarantee even greater region-based inaccuracies in vote-counting. As Respondents and others have emphasized repeatedly in the litigation surrounding the 2000 presidential election, *see, e.g.*, *Siegel v. Lepore*, No. 00-15981, 2000 WL 1781946 (11th Cir. 2000), the cause of the problems that the petition for a manual recount seeks to remedy — namely, variation by county of the probability that a vote was registered as a nonvote — results from the different types of ballots and machinery used in each of Florida's counties.

This case is thus quite similar to other election law cases where this Court has held that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness v. Fortson*, 403 U.S. 431, 441-42 (1971); *see also Buckley v. Valeo*, 424 U.S. 1, 70-75 (1976) (suggesting that minor political parties must be treated differently from major parties under campaign finance disclosure laws given the heightened possibility of intimidation and privacy violations of minor party members); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 95-102 (1982) (applying *Buckley*'s rationale to law regulating campaign disbursements). That Florida's counties are not similarly situated when it comes to the probability of a vote registering as a nonvote cannot be disputed; it is the *raison d'etre* of the contest proceeding. Were the Florida Legislature and the Florida Supreme Court that interprets its commands to fail to fashion a recount process that was sensitive to such disparities, they would leave the intercounty variations at the stage of voting mechanics unremedied and

absolutely guarantee that voters in some counties, but not others, would have their votes more accurately tabulated. *Cf. Reynolds v. Sims*, 377 U.S. 533, 557, 566 (1964) (emphasizing that the right to vote entails the right to have one's vote counted equally with others'). Allowing local officials to tailor recount procedures to meet technical, county-specific challenges is, indeed, the only way that Florida can reconcile its decentralized electoral scheme with the demand of equal treatment the Fourteenth Amendment requires. A state that allows votes to be erroneously counted as nonvotes in some counties based on the combined arbitrariness of voting machinery and the absence of compensatory administrative and judicial remedies violates Equal Protection and the First Amendment rights of voters to have their expressed preferences on the ballot "heard" through the official tally. *Cf. Anderson v. Celebrezze*, 460 U.S. 780, 793-94 (1983).

As a practical matter, recounting standards must adapt to exigent circumstances. When a statewide recount is ordered to be completed in a span of days, only the local officials and canvassing boards can possibly know how the "intent of the voter" might manifest itself (and thus be ascertained) on a given ballot in a particular election in a given jurisdiction. A more specific decree from the Florida Supreme Court not only would have risked the charge of "legislating" in alleged contravention of 3 U.S.C. § 5, but could invariably cause greater difficulty in execution because such a standard would be insensitive to differences of the ballot equipment used. The decentralization of authority in the conduct of a recount maps perfectly onto Florida's statutory scheme, which delegates all important decisions as to ballot creation, voting mechanics, and tallying of votes to local canvassing boards.

Were it upheld by this Court, petitioners' argument threatens to undermine almost any recount procedure used for statewide office in Florida or throughout the country. Recount procedures are needed most when idiosyncracies in ballot design and voting mechanics lead to geographically correlated errors in the initial count. Only through the process of recounting can the election official vested with the proper authority discover precisely the nature of the error committed that may have caused an erroneous tabulation in the original count. The recounting process represents, in part, a process of discovery why the "intent of the voter" may not have been accurately expressed through the ballot machinery designed to capture it. Petitioners would prefer that we not discover the source of such biases in electoral machinery and counting processes until after the election when an intensive reexamination of the actual ballots will have zero electoral impact.

The inevitable conclusion that follows from Petitioners' Equal Protection argument is not that this Court should halt the recounts, but rather that the Court should throw out the results of this election themselves because a different election effectively took place in different Florida counties. With that unacceptable outcome taken off the table, local discretion in judging represents the only way to approach fairness in the tabulation of different ballots that are products of different voting mechanisms. A generalized grant of authority to focus on the intent of the voter may be an imperfect remedy for the spotty problems caused by the State's delegation of broad electoral authority to local officials, but it is the only way to move closer to guaranteeing that each Floridian's vote is counted and voice is heard.

CONCLUSION

There is a terrible irony in this appeal. This Court has spent the last 50 years seeking to remove obstacles to voting. In case after case, this Court has championed the equal right to vote — and the equal right to have one's vote counted. Today, in this Court's climactic confrontation with democracy, instead of acting as the nation's ultimate guarantor of democracy, a narrow majority of this Court appears poised to prevent Florida officials from counting thousands of uncounted Presidential ballots on which the 2000 Presidential election may turn.

Thousands of Florida voters stand on the threshold of disenfranchisement because of mechanical error in the tabulation of punch card ballots by outdated voting machines that all concede have an unacceptably high margin of error. Florida law — as does Texas law — provides the means to prevent disenfranchisement by authorizing judicially supervised hand recounts of the, until now, "undercounted" ballots. The Supreme Court of Florida — the ultimate authority on Florida law — has spoken, and has directed that a judicially supervised hand recount take place immediately pursuant to flexible standards designed to identify the will of the voter in the different settings caused by the use of different types of voting machines throughout the State. The recount has begun in an orderly manner and under careful judicial supervision, with the prospect that, whoever wins, the nation will be reassured that the 2000 Presidential election was decided in the voting booth; not in a political back room. For this Court, at this point, to intervene to prevent democracy from working is, with respect, a compromise of the democratic ideals in defense of which this Court has struggled for the past half century.

For the above-stated reasons, this Court should affirm the Florida Supreme Court's opinion.

Respectfully submitted,

BURT NEUBORNE
Counsel of Record
NATHANIEL PERSILY
PHILIP G. GALLAGHER
BRENNAN CENTER FOR JUSTICE
AT N.Y.U. SCHOOL OF LAW
Attorneys for Amicus Curiae
161 Avenue of the Americas
12th Floor
New York, New York 10013
(212) 998-6730